Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DANIEL JAMES FOWLIE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in requiring petitioner prove his counsel's actual conflict had an adverse effect on his performance in order to establish a Sixth Amendment violation, where the trial judge failed to inquire into the conflict, and either knew or reasonably should have known of the conflict?

2. Did the Court of Appeals err in ruling that because petitioner's counsel vigorously challenged the government's evidence of guilt, his failure to offer evidence which assumed petitioner's innocence was not an adverse effect of his actual conflict?

PARTIES TO THE PROCEEDINGS

Petitioner Daniel James Fowlie was the petitioner in the district court and appellant in the Court of Appeals for the Ninth Circuit. Before the district court, the respondent was the United States of America. The Court of Appeals for the Ninth Circuit identified the appellee as being the United States of America, and it is the only respondent in this Court.

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ORDERS OF THE DISTRICT AND CIRCUIT COURT

The June 26, 2001 order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing is unreported. A copy of the order is Appendix A. The March 9, 1999 Memorandum of the Court of Appeals affirming the district court's denial of petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate his conviction is unreported. A copy of the Memorandum is Appendix B. The district court's order denying petitioner's § 2255 motion is unreported. A copy of the order is Appendix C.

JURISDICTION

Petitioner invoked the jurisdiction of the district court by filing a motion pursuant to 28 U.S.C. § 2255. Petitioner appealed and invoked the jurisdiction of the court of appeals pursuant to 28 U.S.C. §§ 1291 & 2253.

The jurisdiction of this Court to review the order of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Amendment VI, U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

PRELIMINARY STATEMENT

Petitioner Daniel James Fowlie was represented at trial by a lawyer who had previously represented his son in a related case before the same judge who presided at petitioner's trial. Unbeknownst to petitioner, in representing petitioner's son, the lawyer told the judge petitioner was indisputably guilty, that it would be foolish to contend otherwise, and that petitioner was also responsible for his son's criminal activity.

The position advanced by the attorney in representing petitioner's son necessarily circumscribed his representation of petitioner. Having openly adopted the position that petitioner was guilty, the attorney "could not swallow [his] words and present [petitioner] as an innocent man." *United States v. Stites*, 56 F.3d 1020, 1025 (9th Cir. 1995) *cert. denied* 516 U.S. 1138 (1996). Moreover, the attorney was ethically restrained from offering evidence which assumed petitioner's innocence because, based on his earlier public statements to the trial judge, the attorney would know, or have reason to believe, that such evidence was false. By aiding in its presentation, the attorney would violate "defense counsel's obligation to avoid assisting in the presentation of what counsel ha[s] reason to believe [is] false testimony." *Holloway v. Arkansas*, 435 U.S. 475, 480, n.4 (1978)

The attorney's defense of petitioner at trial was limited to challenging the government's evidence and arguing it failed to prove petitioner's guilt. The attorney refrained from offering available evidence to prove

affirmatively petitioner was not guilty, including evidence that provided an innocent explanation for otherwise incriminating conduct. Petitioner was convicted and sentenced to thirty years. His conviction and sentences were affirmed on appeal.

After learning post-appeal of the above facts regarding his lawyer's representation of his son, petitioner filed a motion to vacate his conviction, on grounds that he had been denied his Sixth Amendment right to conflict-free counsel. The district court ruled petitioner had failed to establish an actual conflict and alternatively failed to demonstrate an adverse effect, and denied relief without an evidentiary hearing.

On appeal, the Ninth Circuit acknowledged the lawyer's self-interest created an actual conflict, and that petitioner had not been advised of or waived the conflict. The court, however, ruled petitioner was not entitled to relief because the lawyer's vigorous defense of petitioner demonstrated the actual conflict did not adversely affect counsel's performance.

This ruling conflicts with this Court's precedent and the principles it has established to govern conflict claims. Under this Court's precedent, petitioner was entitled to relief without the need to demonstrate the actual conflict had an adverse effect, because the trial judge failed to inquire into the conflict, about which she knew or reasonably should have known.

The court of appeals also erred in ruling that counsel's vigorous defense of petitioner through cross-examination and argument demonstrated his actual conflict did not adversely affect his performance. This Court has recognized that the adverse effect of a conflict often is what counsel refrains from doing. The adverse effect of the conflict was that counsel refrained from defense efforts that conflicted with his self-interest, i.e., offering available evidence which required him to assume petitioner's innocence. That showing of adverse effect cannot be rebutted by counsel's defense efforts at cross-examination and argument, because those efforts were consistent with his self-interest.

STATEMENT OF THE CASE

A. Initial Proceedings In The District Court

On November 30, 1988, a Central District of California grand jury returned a superseding indictment charging petitioner Daniel James Fowlie with marijuana related offenses, including engaging in a continuing criminal enterprise ("CCE") (21 U.S.C. § 848).[1]

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[1] The indictment also charged petitioner with conspiracy to possess marijuana with intent to distribute (21 U.S.C. § 846); seventeen counts of possession and distribution of marijuana (21 U.S.C. § 841(a)(1)); conspiracy to defraud the United States by impeding the IRS (18 U.S.C. § 371); and five counts of failing to report currency transportation

In June, 1989, the grand jury returned a related twenty-five count indictment charging petitioner's two sons, Gus Fowlie and Dan Fowlie, Jr., and other defendants, with conspiracy to possess with intent to distribute marijuana and related charges. Petitioner was named as an unindicted coconspirator. According to the government, "although father and son were charged in separate indictments, the acts underlying the conspiracies alleged in the two cases are substantially identical." App C -16-18.

Attorney James D. Riddet represented petitioner's son Gus Fowlie. Riddet negotiated an agreement for Gus Fowlie to plead guilty to one count of conspiracy to possess marijuana with intent to distribute. App C -17. As a condition of the plea Gus Fowlie made a written statement incriminating petitioner, stating he had "assist[ed] in the transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and others." App C -17.

At sentencing, Riddet minimized Gus Fowlie's offense by assigning responsibility for his involvement in the marijuana conspiracy to petitioner. Riddet told the judge, "It would be foolish to dispute the fact that Mr. Fowlie senior [petitioner] was running an extremely large marijuana organization. And what concerns me is *(sic)* counsel for Gus Fowlie is that that might rub over onto Gus Fowlie who was indeed a minimal participant, nothing

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(31 U.S.C. §§ 5316, 5322(a),(b)).

more than unfortunately the son of Dan Fowlie senior." App Ç -17. Riddet made further statements to the judge that assumed and asserted petitioner's guilt. *Id.*

The judge expressed her agreement, stating petitioner had "snar[ed] both" Gus Fowlie and his brother into the marijuana operation and sentencing Gus Fowlie to 24 months imprisonment. App C -17-18.

In June, 1990, nine months after Gus Fowlie's sentencing on September 25, 1989, petitioner appeared before the court, having been extradited from Mexico. Initially petitioner was represented by appointed counsel and subsequently retained private counsel, San Diego attorney Michael Pancer, and Pancer selected Riddet as local counsel. App C 18-19.

Riddet sought to file a substitution of attorney authorizing he and Pancer to replace petitioner's appointed counsel. The judge refused the substitution, stating "[i]t seems to me I should rightly be concerned also about the possibility of a conflict here," explaining that "I can only say that I'm left with the impression that the Fowlie juniors had strongly suggested, if not through counsel, through some of the filings with the court, that it was Dan Fowlie who is responsible for everyone's misconduct in this case." Reporter's Transcript ("RT") 11/19/90 p. 142-43.

On November 21, 1990, petitioner's appointed attorneys filed a motion requesting Pancer and Riddet be allowed to replace them. App C -18-19. App C-19. The

government's opposition said Riddet had a conflict, and expressed "serious reservations as to whether it is possible for [petitioner] to fully and effectively waive the conflicts." App C-19.

On November 26, 1990, the judge denied the proposed substitution of Pancer because he had represented a prospective government witness. App C-19. The judge also stated she was "not satisfied that there is not a problem here [with attorney Riddet]," and declined to permit his substitution. RT 11/26/90, p. 39.

On December 4, 1990, Riddet filed a motion with petitioner's appointed counsel to continue the trial date and to allow him to substitute into the case. App C-20. At a hearing on December 10, the judge again expressed reservations about Riddet's representation of petitioner, stating she would allow Riddet to argue the pretrial motions set for hearing that day "[s]olely under these circumstances perhaps as lacking any other status amicus at this time." RT 12/10/90, p. 10. Near the conclusion of the hearing, after it became apparent the trial would be continued, the judge granted the motion to substitute, even though it had not been argued or even discussed. App C-19.

The court issued a minute order stating that no conflict of interest existed in Riddet's representation of petitioner. App C-19-20 ("Court hears further from all counsel re defendant's motion to continue and substitute counsel, finds no conflict exists re Attorney Riddet . . . .").

Trial began on March 5, 1991. Twenty counts of the indictment went to the jury, and guilty verdicts returned as to fifteen, including the CCE charge. Petitioner was sentenced in June, 1991 to 30 years on the CCE count and concurrent sentences on the remaining counts totaling 25 years, and a $1 million fine.

B. Direct Appeal

Petitioner's conspiracy conviction was vacated on direct appeal, and all other convictions were affirmed in two separate opinions. *United States v. Fowlie*, 24 F.3d 1059 and 24 F.3d 1070 (9th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995).

C. Collateral Proceedings

On October 2, 1995, petitioner filed a motion pursuant to 28 U.S.C. section 2255 to vacate his conviction and sentence. CR 312, 313. The motion contained a double jeopardy claim and a conflict of interest claim.[2] The conflict claim was supported by declarations from petitioner and two experts, Professor Geoffrey Hazard and

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[2] The motion also alleged attorney Riddet had an actual conflict based on his representation of Gus Fowlie, and a third actual conflict based on his representation of Wade Westmoreland, the manager of petitioner's ranch, in a related state prosecution and in proceedings before the grand jury that indicted petitioner. Review is sought only as to the self-interest conflict.

Professor Dennis Curtis. CR 314.

The government filed its opposition on July 8, 1996. No declaration or statement from Riddet disputing petitioner's allegations was submitted in support of the opposition. CR 332.

The district court filed denied the motion in a written order. App C. The district court said that petitioner's arguments that his lawyer had an actual conflict were "pure speculation," and ruled alternatively that petitioner had failed to demonstrate an adverse effect of the claimed actual conflict. App C-10-11. Petitioner timely appealed on October 30, 1997. CR 347.

On appeal, the Ninth Circuit acknowledged the lawyer's self-interest created an actual conflict, and that the record did not reflect petitioner had been advised of the conflict. App B-4-5. The court, however, said petitioner was required to further demonstrate that the conflict adversely affected counsel's performance, and ruled that defense counsel's vigorous defense of petitioner throughout cross-examination and argument demonstrated the actual conflict did not adversely affect his performance. App B-5.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review should be granted because the ruling of the Court of Appeals for the Ninth Circuit presents the same question as to which the Court has granted *certiorari* in *Mickens v. Taylor*, 240 F.3d 348, 358-59 (4th Cir.)(en banc), *certiorari granted*, 121 S. Ct. 1651 (2001) - "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?".

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred in Requiring Petitioner Demonstrate His Counsel's Actual Conflict Of Interest Had an Adverse Effect On His Performance in Order to Establish a Sixth Amendment Violation, Given that the Judge Failed to Inquire Into the Conflict Which She Knew or Reasonably Should Have Known Existed

A. The Sixth Amendment Right to Conflict-Free Counsel

The right to counsel guaranteed by the Sixth Amendment encompasses the right to be represented by counsel whose duty of loyalty is free of conflicting interests. *Wood v. Georgia*, 450 U.S. 261, 271 (1981), *citing*, *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 483, n.5 (1978) (constitutional right to "the assistance of an attorney unhindered by a conflict of interests.")

B. A Trial Judge Has a Duty to Inquire into a Conflict about Which She Knows or Reasonably Should Know.

This Court has established limited circumstances in which a trial court has a duty to inquire about a potential conflict. Where a defendant or counsel raises an objection to representation on conflict of interest grounds, a court

has a duty of inquiry. *Holloway*, 435 U.S. at 483-484 (defendants' convictions reversed due to the trial court's failure, after repeated objections by defense counsel, to inquire into the risk of joint representation or appoint separate counsel). Even in the absence of an objection, a trial judge has an affirmative duty to inquire into a conflict if the judge "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347; *Wood*, 450 U.S. at 273, n.18.

C. A Petitioner Is Entitled to Relief Without the Need to Demonstrate an Actual Conflict Adversely Affected His Lawyer's Performance, If a Judge Fails to Inquire into a Conflict about Which She Knows or Reasonably Should Know.

As a general rule, to establish a denial of the right to conflict-free counsel, a petitioner who did not object at trial must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348.

A different rule applies where a trial court fails to fulfill its duty of inquiry. Where a trial court knows or reasonably should know that a conflict exists, and fails to inquire into the conflict, a petitioner need only demonstrate that an actual conflict existed to be entitled to relief. A petitioner is not required to additionally establish the conflict "adversely affected" the lawyer's performance. *Wood*, 450 U.S. at 273, n.18 ("Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry

even though it 'knows or reasonably should know that a particular conflict exists.'"), *quoting*, *Sullivan*, 446 U.S. at 347 (emphasis in original).

The rule established by *Sullivan*, and recognized by the Court in *Wood*, which dispenses with the need for a petitioner to demonstrate "adverse effect," finds its origin in the Court's earlier decision in *Holloway, supra.* Defense counsel in *Holloway* repeatedly objected to being required to represent three codefendants at the same trial. The trial court did not take any action in response to the objections, other than to deny them. *Id.*, 435 U.S. at 478-481.

The Court ordered the defendants' convictions reversed. *Id.*, 435 U.S. at 484. The Court did not examine whether the lawyer's performance was adversely affected by an actual conflict, nor did it even determine whether an actual conflict existed. Instead, the Court ruled relief was warranted due to the trial court's failure to inquire into the risks that multiple representation presented, or to appoint separate counsel. *Ibid.* Thus, *Holloway* established that where a trial court is made aware of a possible conflict of interest by a defense objection, and fails to inquire into the conflict, a defendant is entitled to relief based on the court's failure to fulfill its duty to inquire.

The Court expanded the scope of the duty of inquiry rule established by *Holloway* in *Sullivan.* According to *Sullivan*, a trial court has a duty to inquire if it "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347.

The *Holloway-Sullivan* duty of inquiry rule was applied by the Court in *Wood v. Georgia*, *supra.* The petitioners in *Wood* challenged the revocation of their probation on equal protection grounds, alleging that the revocation of their probation for failure to pay a fine discriminated against them on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment. *Wood*, 450 U.S. at 262. The Court granted review to address that question, but then declined to do so because it realized the record suggested "that petitioners may be in their present predicament because of the divided loyalties of their counsel . . ." *Id.*, 450 U.S. at 262-263. The Court observed that the same lawyer had represented all three petitioners throughout the proceedings, and that the lawyer's fee in all three instances was paid by petitioners' employer, the owner of the adult book store where petitioners committed the crimes. *Id.*, 450 U.S. at 265-267.

The Court determined that the existence of a conflict was sufficiently apparent from the record so as to impose upon the state court a duty of inquiry under *Sullivan*. After determining the trial court had a duty of inquiry, and that it had failed to fulfill that duty, the Court ordered a remand "to determine whether the conflict of interest that this record strongly suggests actually existed," and directed a new hearing be granted if "an actual conflict of interest existed at that time." *Wood*, 450 U.S. at 274. The Court did not condition the right to relief upon a showing that counsel's performance was adversely affected by an actual conflict, but only upon a showing that an actual conflict existed.

Further support for the conclusion that where a court has failed to fulfill its duty of inquiry under *Sullivan*, a defendant need only establish that an actual conflict existed to be entitled to relief, is provided by the Court's statement in footnote 18: "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood*, 450 U.S. at 273, n.18, *quoting*, *Sullivan*, 446 U.S. at 347 (emphasis in original).

The right to relief established by *Sullivan* where a court fails to fulfill its duty of inquiry, and an actual conflict is demonstrated to exist, has been applied or acknowledged by four circuits. See *Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995); *United States v. Crespo de Llano*, 830 F.2d 1532, 1538 (9th Cir. 1987); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir. 1985); *United States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985).

The First and Fourth Circuits, on the other hand, disagree that *Sullivan* or *Wood* establish such a rule. According to those circuits, even where a court has failed to fulfill its duty of inquiry, a defendant must demonstrate not only that an actual conflict existed, but that the actual conflict adversely affected counsel's performance. See *Mickens v. Taylor*, 240 F.3d 348, 358-59 (4th Cir. 2001)(en banc), *certiorari granted*, 121 S. Ct. 1651 (2001); *Brian v. United States*, 695 F.2d 10, 15, n.10 (1st Cir. 1982).

The question of whether a petitioner must establish an actual conflict of interest existed, and demonstrate that it adversely affected his lawyer's performance in order to

obtain relief where a trial court fails to fulfill its duty of inquiry, is presently before this Court pursuant to the grant of *certiorari* in the Fourth Circuit's decision in *Mickens v. Taylor*, 121 S. Ct. 1651 (2001).

D. Petitioner's Counsel Was Burdened by an Actual Conflict

This Court has stated that "attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." *Holloway*, 435 U.S. at 486 (internal quotations & citation omitted) Having represented to the trial judge that petitioner was guilty, attorney Riddet "could not swallow [his] words and present [petitioner] as an innocent man." *Stites*, 56 F.3d at 1025. As the Court of Appeals explained in *Stites*, "nothing in our professional ethics permits an advocate to tell a court one set of facts today and a contradictory set of facts tomorrow." *Id.* at 1026.

Petitioner's counsel was ethically restrained from offering evidence which required him to assume petitioner's innocence. Under well established ethical provisions, an attorney may not present facts to a court which he or she believes are false, and is prohibited from taking any steps or in any assisting a client in presenting false evidence. *Nix v. Whiteside*, 475 U.S. at 166, 167-169, 106 S. Ct. at 994, 995; *see, e.g.*, California Rules of Professional Conduct, Rule 5-200(B); A.B.A. Model Rules, Rule 3.33. As this Court noted in *Holloway*, defense counsel has an "obligation to avoid assisting in the

presentation of what counsel had reason to believe was false testimony." *Holloway*, 435 U.S. at 480, n.4. That ethical restriction meant petitioner's attorney was not free to present affirmative evidence which required him to assume petitioner's innocence, because, based on the attorney's earlier public statements of petitioner's indisputable guilt, he would have to know, or have reason to believe, such evidence was false. *Nix v. Whiteside*, 475 U.S. at 166. While the attorney could challenge the government's evidence and argue it failed to prove petitioner's guilt, the attorney was not free to affirmatively offer defense evidence which assumed petitioner's innocence without violating the ethical rules that governed his conduct.

A conflict thus resulted, because the attorney's self-interest dictated that he limit his defense of petitioner to challenging the government's evidence in order to avoid the appearance of presenting evidence he knew or believed was false, and that self-interest conflicted with petitioner's interest, which dictated that decisions about his defense be made according to whether they would aid in achieving his acquittal. Indeed, the Court of Appeals acknowledged that petitioner's counsel had an actual conflict as a result of having represented to the trial judge, that petitioner was guilty and was also responsible for his sons' criminal activity. App B-4-5.

E. The Judge Knew or Reasonably Should Have Known of the Actual Conflict and Failed to Inquire Into the Conflict

The facts giving rise to counsel's actual conflict were statements he made to petitioner's trial judge that petitioner was guilty. The judge openly expressed her agreement with counsel's position, stating that petitioner was responsible for involving his sons in criminal activity. App C 18. Based on these circumstances, the trial judge reasonably should have known of the conflict.

That is especially true here, because the record confirms the judge was cognizant of the conflict. When the judge first refused Riddet's proposed substitution, she stated "[i]t seems to me I should rightly be concerned also about the possibility of a conflict here," and went on to explain, "I can only say that I'm left with the impression that the Fowlie juniors had strongly suggested, if not through counsel, through some of the filings with the court, that it was Dan Fowlie who is responsible for everyone's misconduct in this case." RT 11/19/90 p. 142-43.

Despite having expressed these concerns about the conflict, the judge inexplicably allowed Riddet's substitution on December 10, 1990. App C-19. The judge never conducted an inquiry into Riddet's self-interest conflict before or after permitting his substitution. In fact, the minute authorizing the substitution ruled there was no conflict. App C-19-20.

Thus, under the rule established by *Sullivan*, and acknowledged by *Wood*, petitioner is entitled to relief - - he has demonstrated his lawyer was burdened by an actual conflict of interest, the record establishes the trial judge knew or reasonably should have known of the conflict, and the judge failed to inquire into the conflict.

II.

The Court of Appeals Erred in Ruling That Counsel's Defense of Petitioner Through Cross-Examination and Argument Demonstrated His Failure to Offer Favorable Evidence of Petitioner's Innocence Was Not an Adverse Effect of the Actual Conflict

A. An actual conflict adversely affects a lawyer's performance, where a lawyer is confronted with a strategic decision that will impact his self-interest and the interest of his client differently, and he chooses the course of action that favors his own interest.

The requirement that a petitioner demonstrate "an actual conflict adversely affected his lawyer's performance" in order to establish a Sixth Amendment violation, was first established by the Court's opinion in *Sullivan*. *Id.*, 446 U.S. at 348. The Court contrasted the standard to its holding: "We hold that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a

defendant must establish that an actual conflict adversely his lawyer's performance." *Id.*, 446 U.S. 350. The *Sullivan* Court used *Glasser v. United States*, 315 U.S. 60 (1942), as an example of a case that would meet this standard. *Sullivan*, 446 U.S. at 348-349.

In *Glasser*, two defendants, Glasser and Kretske, had initially been represented by separate counsel. During the course of the trial, Kretske dismissed his lawyer and the trial judge then appointed Glasser's lawyer, Stewart, to represent Kretske as well. Stewart objected, unsuccessfully, on grounds that his representation of both Glasser and Kretske might lead the jury to link the two defendants together, and thus created a possible conflict of interest. After becoming counsel for both Glasser and Kretske, Stewart failed to cross-examine a government witness who linked Glasser to the conspiracy and failed to object to the admission of arguably inadmissible evidence. *Glasser*, 315 U.S. at 72-75. The Court viewed those failures to be the result of Stewart's desire to protect Kretske's interests by diminishing the jury's perception of his guilt, and as "indicative of Stewart's struggle to serve two masters . . . ." *Glasser*, 315 U.S. at 75.

In explaining *Glasser*, the Court in *Sullivan* stated that, "[s]ince this actual conflict impaired Glasser's defense, the Court reversed his convictions." *Sullivan*, 446 U.S. at 349. The Court in *Sullivan* also noted that "[o]nce the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of

the 'right to have the effective assistance of counsel.'" *Sullivan*, 446 U.S. at 349, *quoting*, *Glasser*, 315 U.S. at 76.

The *Sullivan* Court's discussion of *Glasser* as an example of a case in which an "actual conflict adversely affected counsel's performance," makes three points about the meaning and application of that standard.

First, an actual conflict exists where counsel is faced with a strategic decision which will impact the interests he represents differently. Thus, for example, an actual conflict existed in *Glasser* because Stewart was faced with deciding whether to cross-examine the witness who linked Glasser to the conspiracy, and the decision he made would impact the interests of Glasser and Kretse differently.

Second, counsel's actual conflict adversely affects his performance with respect to the client whose interest is disserved by the strategic decision. Again this point is illustrated by *Glasser*. Stewart's failure to cross-examine the government witness served Kretske's interests, but disserved Glasser's interests, and the Court ruled that the conflict resulted in a violation of Glasser's Sixth Amendment rights, but not Kretske's. *Glasser*, 315 U.S. at 76. The Court has emphasized on other occasions that the harmful effect of a conflict lies in what a lawyer fails to do. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway*, 435 U.S. at 489-490.

Third, if an actual conflict adversely affected counsel's performance, prejudice is presumed and a Sixth

Amendment violation established. *Sullivan*, 446 U.S. at 349 ("The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'"), *quoting*, *Glasser*, 315 U.S. at 76. This point was also made explicit in *Strickland v. Washington*, 466 U.S. 668, 692 (1984)("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests,' and that 'an actual conflict adversely affected his lawyer's performance.'"), *quoting*, *Sullivan*, 446 U.S. at 350, 348.

B. Counsel's failure to offer available evidence to prove affirmatively petitioner was not guilty constituted an adverse effect of the actual conflict.

The conflicting interests in this case were Riddet's self-interest, which dictated that he limit his defense of petitioner to challenging the government's evidence of guilt, and refrain from offering evidence which assumed petitioner's innocence, and the interest of petitioner, which dictated that decisions about defense strategy and defense evidence be made according to whether they would aid petitioner in achieving an acquittal.

Petitioner demonstrated this actual conflict adversely affected his lawyer's performance by identifying available evidence that would have aided petitioner's defense, but harmed counsel's self-interest. That evidence included the following:

1. Evidence that the instrumentalities of marijuana smuggling found at petitioner's ranch were the property of the ranch manager Westmoreland, and not petitioner.

Police searched petitioner's ranch on March 1, 1985, and seized instrumentalities of marijuana smuggling. The prosecution offered these items at trial as the property of petitioner and thus evidence of his guilt.[3]

Evidence was available to petitioner's counsel that was relevant to prove the incriminating items were the property of the manager of the ranch, Wade Westmoreland, and not petitioner. The day before petitioner's ranch was searched, Westmoreland's apartment was searched and police seized a large quantity of marijuana, $73,000 cash, loaded and unloaded firearms, and ledgers reflecting large scale sale of controlled substances. As noted above, Westmoreland was the manager of the ranch, and when arrested, Westmoreland had keys to the ranch on his personal key chain. App C-15. Police used Westmoreland's connection to the ranch, to obtain a warrant to search the ranch the very next day. App C-15. Westmoreland later filed a motion to suppress the items seized at petitioner's ranch and submitted a signed declaration demonstrating he had standing to assert

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[3] Among the items were an Uzi firearm with a flash suppressor, bullet proof vests, money counter, counterfeit bill detector and other incriminating items of drug paraphernalia.

a Fourth Amendment interest as to a search of the property. Petitioner's counsel could have used this same evidence, (*i.e.*, the facts set forth in the search warrant affidavit and the statements in Westmoreland's declaration), to connect Westmoreland to the ranch and the instrumentalities of marijuana smuggling which were seized at the ranch. App C-15.

Petitioner's counsel did not use any of this evidence. Instead, counsel attempted to dispute the prosecution's claim that the items belonged to petitioner by pointing to the absence of direct evidence connecting petitioner to the items or the ranch[4] and eliciting in cross-examination the names of three other people who might have had access to the ranch ER 578-79.

2. Evidence that Westmoreland, and not petitioner, was the manager of the conspiracy, to prove petitioner was not guilty of the CCE charge.[5]

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[4] Counsel relied on what the prosecution witnesses had not established -- "[petitioner] was not seen by any of the agents who searched the ranch. There's also no evidence by way of surveillance that he was seen on or about that ranch in the time period of the search, that is, March of 1985." ER 578.

[5] The CCE charge required the government to prove, *inter alia*, that he occupied a position of manager, leader or organizer with respect to five people, in the commission of

The same evidence discussed above, including the statements of law enforcement officers that identified Westmoreland as the manager of the ranch, as well as Westmoreland's guilty plea to possession of marijuana for sale in the related state prosecution, could have been used by petitioner's counsel to implicate Westmoreland as the manager of the conspiracy. In fact, while petitioner was in Mexico fighting extradition, Riddet provided petitioner's Mexican counsel with an affidavit that placed responsibility for the criminal activity at the ranch on Westmoreland, and exculpated petitioner. ER 170.

Petitioner's counsel did not use any of this evidence, even though the affidavit he supplied for petitioner's extradition hearing in Mexico confirmed the validity of such a strategy. Instead, counsel attempted by cross-examination of the government's cooperating witnesses to shift responsibility to them for the marijuana activities at the ranch.

3. Evidence that petitioner left the U.S. more than a week before the search of his ranch.

The prosecution contended that immediately after and in response to the search of his ranch, petitioner fled to Mexico and that his immediate flight proved he was guilty. ("[R]ight after that ranch search, he fled to Mexico.

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a series of narcotics felonies, and the jury had to agree unanimously on the five people whom he managed, lead or organized. See 21 U.S.C. § 848(c).

If he was not guilty, if he had nothing to do with that, why did he go to Mexico?"; "And finally, ladies and gentlemen, why did the defendant flee to Mexico suddenly if he is not guilty?" ER 582, 583). Petitioner's counsel had available evidence which he could have offered to prove petitioner left the United States for his home in Costa Rica more than a week before the search of the ranch. This evidence included petitioner's passport, which showed that he left the United States ten days before the search and arrived in Costa Rica on February 19, 1985. ER 13, 26.

Petitioner's counsel never used the passport. Instead, he noted the absence of testimony placing petitioner at the ranch on the day of the search to defend against the prosecution's allegation that petitioner's guilt was proven by his sudden flight to Mexico after the search.

4. Evidence petitioner had loaned Cooper hundreds of thousands of dollars for real estate investments and other legitimate purposes, to provide an innocent explanation for the money Cooper paid to petitioner.

The prosecution presented evidence of payments from Cooper to petitioner, and testimony by Cooper that the payments were for marijuana. Petitioner's counsel had available evidence which he could have offered to prove Cooper owed petitioner large sums of money for legitimate loans, which would have provided an innocent explanation for the payments. That evidence included the contracts documenting the loans, their amounts and

purposes. ER 13, 584.

Petitioner's counsel did not present any documents for any of the loans. Instead, he cross-examined Cooper about the loans. Even after Cooper denied the loans, except for one which he contended had long been paid, petitioner's counsel still did not offer the contracts and related documents. ER 409-11.

C. Petitioner's showing that counsel's failure to offer evidence of innocence was an adverse effect of his actual conflict is not rebutted by counsel's defense of petitioner through cross-examination and argument.

The Court of Appeals rejected petitioner's contention that his counsel's failure to use the evidence discussed above demonstrated his actual conflict adversely affected his performance. The Court of Appeals gave its reasons for this ruling in two sentences: "[Petitioner] fails to meet his burden to demonstrate, with a factual showing on the record, that the self-conflict adversely affected his attorney's performance. [citation omitted] Rather, the record demonstrates that [petitioner's] attorney argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift blame to several viable suspects." Appendix B - 5.

The efforts of petitioner's counsel cited by the Court of Appeals to support its ruling - i.e., he argued petitioner's innocence, vigorously cross-examined the government's witnesses and attempted to shift blame to

several viable suspects - do not legally or logically demonstrate that his failure to offer evidence which required him to assume petitioner's innocence was not an adverse effect of his actual conflict. None of the actions cited by the Court of Appeals were inconsistent with counsel's self-interest. That is, they involved challenging the government's evidence of guilt, which counsel could do without appearing to offer evidence he knew or had to believe was false. Counsel's use of strategies that were consistent with his self-interest does not mean that his failure to offer evidence which would have aided petitioner's defense but conflicted with his self-interest was not an adverse effect of his actual conflict. In fact, counsel's exclusive use of strategies that were consistent with his self-interest, and avoidance of those which were inconsistent with his self-interest, supports petitioner's showing that counsel's actual conflict adversely affected his performance.

This includes what the Court of Appeals referred to as counsel having argued petitioner's innocence. App B-5. Counsel's assertions of petitioner's innocence equated petitioner's "innocence" with the government's failure to prove him guilty beyond a reasonable doubt, not with actual innocence. See RT 91-92 ("When this case is over, I fully expect that you will find from the evidence that the charges which have been brought against Mr. Fowlie have not been proven and that he is innocent of these charges.")

Nor does the vigorous manner in which counsel executed these strategic choices demonstrate that his

failure to offer affirmative evidence was not an adverse effect of his actual conflict. Counsel may well have made the best effort he could to achieve an acquittal within the limits his self-interest imposed on petitioner's defense. Counsel may have tried as hard as he could to win with one hand tied behind his back, but that does not mean his performance was not adversely affected.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions presented in this petition.

Respectfully submitted,

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